SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 198

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Michigan-Wisconsin Pipe Line Company (hereafter sometimes referred to as "Michigan-Wisconsin") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas in Cause No. 10,117 on its docket.

Opinion Below

The trial judge filed no opinion. The opinion of the Court of Civil Appeals is reported at 255 S. W. 2d 535, and a copy is attached hereto as Appendix A.

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act [1]—is here involved. A copy of Section XXIII is attached hereto as Appendix B, and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent)

> "In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

> "In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant

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[1] Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

Statement

Michigan-Wisconsin is a natural gas pipeline company holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U. S. C., Sec. 717, *et seq.* It owns and operates a pipeline transportation system which originates in the Panhandle of Texas, less than two miles from the Oklahoma state line, and terminates at various points in the States of Michigan and Wisconsin. At these points and at other points in Missouri and Iowa, it sells natural gas to local distribution companies which serve domestic and industrial consumers in those areas. Its sole business is the interstate purchase, transportation and sale of natural gas.

All of the gas transported by Michigan-Wisconsin is purchased by it from Phillips Petroleum Company. That company operates a network of pipelines through which it brings the gas from individual wells or groups of wells to its gasoline plant located adjacent to the mouth of Michigan-Wisconsin's pipeline in Hansford County, Texas. At this plant certain liquefiable hydrocarbons (gasoline and other liquid products) are removed from the gas by Phillips, and remain the property of Phillips.

The remaining natural gas, known technically as "residue gas," flows from the absorbers in the Phillips gasoline plant through pipes owned by Phillips for 300 yards to the boundary between the property owned by that company and that of Michigan-Wisconsin. There, without any break in the flow, the gas enters the interstate pipeline

system owned by Michigan-Wisconsin. It is at this point that title to the gas passes from Phillips to Michigan-Wisconsin, and it is this taking or receiving of gas by the latter into its lines which the statute here involved designates as the taxable incident, as will be pointed out in more detail below.

Following the receipt by Michigan-Wisconsin of the residue gas, such gas flows a short distance to a compressor station, where, by raising the pressure of the gas, appellant utilizes the expansion characteristics of the gas as the motive power for further movement along its journey.[2] From the compressor station in Texas, the gas flows through appellant's pipeline system 1.74 miles to the Oklahoma border, and thence to the consuming markets in other states. Additional motive power for this journey is furnished by 15 other compressor stations which are operated in other states through which the gas is transported. It was stipulated by the parties, and the Court of Civil Appeals found:

> "The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.
>
> "All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported." Appendix A, *infra*, 255 S. W. 2d at 539.

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[2] A schematic diagram of the operations just described is attached as Appendix B to the opinion of the Court of Civil Appeals, Appendix A, *infra*, 255 S.W. 2d at 548.

Section XXIII of H. B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business" (Sec. 2). Reduced to its essentials therefore, the challenged statute levies a tax of 9/20 of a cent per m. c. f. upon Michigan-Wisconsin for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Michigan-Wisconsin under protest, pursuant to the provisions of the statutes of Texas,[3] and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That court entered judgment for Michigan-Wisconsin for the full amount of the taxes paid plus interest as provided by statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Michigan-Wisconsin filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the decision and judgment of the Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its mo-

[3] Article 7057b, Vernon's Annotated Civil Statutes.

tion for rehearing was denied on June 3, 1953. Because the Supreme Court of Texas refused to grant appellant's application for writ of error, the Court of Civil Appeals is the highest court of the State in which a decision could be had. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of the Supreme Court to review by appeal the decision of the Court of Civil Appeals herein is conferred by Title 28 U. S. C., Section 1257(2). The decisions sustaining this Court's jurisdiction on appeal include *United Gas Public Service* v. *Texas*, 301 U. S. 667 (1937); *Lone Star Gas Co.* v. *Texas*, 304 U. S. 224 (1938); *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499 (1931); *Adams* v. *Saenger*, 303 U. S. 59, 61 (1938); *Bacon* v. *Texas*, 163 U. S. 207 (1896); *Sullivan* v. *Texas*, 207 U. S. 416 (1907); *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U. S. 476 (1916); *St. Louis, Etc., Ry. Co.* v. *Seale*, 229 U. S. 156 (1913); *American Railway Express Co.* v. *Levee*, 263 U. S. 19 (1923).

Manner in Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not

it is valid."[4] This Court will accept the recognition by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185 (1945).

The Question Presented by This Appeal Is Substantial

There is but one issue involved in this appeal and that taken by Panhandle Eastern Pipe Line Company in a companion case: Whether the so-called "gathering tax" imposed by the State of Texas upon interstate carriers of natural gas for the *privilege* of receiving such gas into the mouths of their interstate pipelines can stand consistently with the Commerce Clause of the Constitution. The facts are simple, the issue clear cut. Because the supply of natural gas is concentrated so heavily in Texas and a few other states, a tax upon the receipt of such gas by interstate pipelines for transportation to the great majority of consumer states has wide and important national repercussions.

The cases now before this Court on appeal were selected by the State of Texas and the pipeline companies as typical test cases through which a conclusive determination of the constitutionality of the "gathering tax" statute as applied to pipeline companies taking gas into their pipelines for transportation to other states could be obtained. Accordingly, all lawsuits initiated by others who paid the tax under protest, of which 117 had been filed as of June 12, 1953, have been stayed pending final decision of the Michigan-Wisconsin and Panhandle Eastern cases and will be affected by such decisions. As of that date also, 15.6 millions of dollars of taxes had been paid under protest, and that

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[4] Appendix A, *infra;* 255 S.W. 2d at 537-8.

amount continues to increase at the rate of one million dollars a month.

It is recognized that the substantiality of an appeal is not measured by dollar amounts or even by the number of cases affected by this Court's decision. Undoubtedly, this Court refuses to entertain many applications for further review which involved large sums of money but which raise frivolous or settled federal questions. That the instant appeals are of quite a different character is significantly indicated by the fact that an able and experienced state trial judge found the statute to be incompatible with the Commerce clause, and the Court of Civil Appeals was able to say no more than:

> "We have no clear or strong conviction that this statute and the Constitution are incompatible." Appendix A, *infra;* 255 S. W. 2d at 546."[5]

Appellant suggests, however, that the substantiality of this appeal may be judged by a more objective standard—the effect of the statute here involved upon the great national purposes which the Commerce Clause was designed to accomplish. The origins of that clause are to be found, of course, in the commercial warfare between the thirteen original states which began after independence had been won. This Court recently quoted Mr. Justice Story to the effect that during that interval:

> ". . . each State would legislate according to its estimate of its own interest, the importance of its own products, and the local advantages or disadvantages of

[5] The State Court in effect invited this Court's review of its decision by stating:

> "The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supreme Court of the United States."

Appendix A, *infra;* 55 S.W. 2d at 543.

its position in a political or commercial view." Story, *The Constitution*, Sec. 259.

This came "to threaten at once the peace and safety of the Union." *Id.* § 60.[6]

As will be shown below, the statute here under consideration was passed by the Texas legislature as a result of a frank and open estimate of the very local interests referred to by Mr. Justice Story. The statute was deliberately aimed at gas moving in interstate commerce; it was designed to produce revenue for the State of Texas by exacting a toll from interstate commerce; it imposes a heavy and effective burden upon such commerce; and, since, as applied to interstate pipelines, the burden of the tax ultimately will be borne by those persons in other states who consume the gas, the statute enables the State of Texas to achieve the politically popular result of raising revenue at the ultimate expense of citizens of other states. In upholding such a statute, the Court of Civil Appeals disregarded the principles applied in every decision of this Court which is in any way analogous.

1. The Background and Purpose of the Statute

The tax here involved is labeled a gas "gathering tax" and purports to be imposed for the privilege of engaging in the occupation of "gathering gas." However, the term, "gathering," has long been used in the gas and oil industry to mean the picking up of gas or oil at individual wells in the field and assembling it at a common point. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484 (1934). Michigan-Wisconsin engages in no such activity. Indeed, the Attorney General of Texas stipulated that Michigan-Wisconsin "gathers" no gas within the meaning of that term, as it

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[6] See *Hood* v. *DuMond*, 336 U.S. 525, 533 (1949).

is consistently used in the gas industry and in ordinary usage.

Thus, what the Texas Legislature did was to take a well-understood term and give it an artificial definition in the statute. "Gathering gas," as there defined, means the "first taking" of possession of gas by a pipeline company "for other processing or transmission" through its pipeline after the gas passes through the outlet of a gasoline plant. It is not Phillips Petroleum Company, the real "gatherer" of the gas in this case, that pays the tax, but Michigan-Wisconsin, which does no more than receive the gas into the mouth of its pipeline for immediate interstate transportation. Of course, the legislature may define its terms as it chooses. Nevertheless, its appropriation of a well-understood term to describe a totally different activity, upon which the tax is imposed, is sufficient alone to justify a suspicion that the tax is one which, in the words of Mr. Justice Brandeis, is "furtively directed" at interstate commerce.[7]

The legislature's purpose was more candidly stated in the report to the House of Representatives by a member of the House-Senate conference committee, who said:

> "You will further recall that by practically every vote that was taken here in the House that we have shown conclusively that *we want a tax on the gas that leaves the State of Texas.* Your Committee feels that the House still wants that very thing. . . . To be perfectly frank with you, and I have nothing whatsoever to hide, that suggested compromise is a cross between a gathering tax and the Hull-Vick amendment. *It will tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries.* . . . You know we have approximately twelve million dollars to raise and you people know that twelve million dollars is a large amount of money

[7] *Cudahy Packing Co.* v. *Hinkle,* 278 U.S. 460, 468 (1929).

> and it will vitally affect the ones that have to pay it. . . . I say to you that the issue is now drawn as to whether or not gas piped out of Texas will be taxed or the money will be raised by adding to the already overtaxed landowner, royalty owner and producer. *I believe that the people of Texas want the gas piped out of the State to be taxed.*" House Journal, June 1, 1951, p. 2979. (Emphasis supplied.) [8]

Here, at any rate, there is no subterfuge. In order to raise additional money for state purposes, and at the same time to lessen the overall tax burden on state residents, the Texas legislature is in effect attempting to levy a tax upon the people of Michigan and Wisconsin, of Ohio, Kentucky, Indiana and a host of other states; and the interstate commerce among the states, which it was the purpose of the Commerce Clause to protect, is the medium by which this shifting of the burden of taxation is sought to be accomplished.

If any further evidence were needed of the purpose of this statute to tax the consumers of gas in other states by a tax on interstate transportation agencies, it may readily be found in two other provisions of Section XXIII. In the first place, Section 4 makes it unlawful for any "gas gatherer" i.e. interstate pipeline company) to attempt by contract to shift the tax to a producer. In other words, producers of gas cannot under any circumstances be made to bear the burden of this tax; it must at all events be borne by the pipeline companies and their customers, the consumers.

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[8] Of course, the gas that is piped out of Texas is already heavily taxed. The state now levies a production tax amounting to 5.72 per cent of the value of the gas and the producer pays an additional ad valorem tax on the value of his lease and producing facilities. Appellant pays an ad valorem tax on the value of its facilities in the state.

In the second place, Section XXIII expressly provides in Section 11:

> "In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

The greater portion of the natural gas produced in Texas is transported to other states for consumption. The Texas legislature has made it perfectly plain that the purpose of the statute will not be accomplished if it cannot be lawfully applied to gas which moves in interstate commerce.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce, or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government.

2. The Effect of the "Gathering Tax" on Interstate Commerce

Every cubic foot of natural gas that leaves the State of Texas is taxed at the rate of 9/20 of a cent per thousand cubic feet. Every gas pipeline company operating lines leaving the state is subject to the tax simply because it "takes possession" of the product within the State for the purpose of transporting it. Obviously, no gas can be transported in interstate commerce unless the carrier first "takes possession" of it. Obviously, too, the Commerce Clause knows no differences of principle based upon the product involved or the method of its carriage. Thus, if Texas may lawfully tax carriers of gas for the privilege of "taking possession" of that commodity for immediate interstate transportation, Minnesota may clearly tax the owners of ore boats for the privilege of "taking possession" of iron

ore at Duluth for immediate transportation to Gary; West Virginia certainly may tax the railroads at so much per ton of coal for the privilege of "taking possession" of that coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The Commerce Clause was designed to end precisely this kind of impost laid upon commercial intercourse between the states. The tax here involved has exactly the same effect as if Texas had erected custom-houses at points where its highways cross over into other states and was requiring every carrier, upon leaving Texas, to pay a tax on the goods carried, for the privilege of having "taken possession" of those goods within the State. If that kind of tax is to be held valid, custom-houses will certainly spring up on the other side of the State's boundaries in retaliation, and every state may soon be expected to tax heavily the export of those of its products which are most valuable to its neighbors. Cf. *Case of the State Freight Tax*, 15 Wall. 232, 276.

The vice of the present statute is particularly pronounced because of the fact that it concerns a product found in relatively few states but desired in many. From the State of Texas, for example, natural gas flows to some 38 other states. Gas transported by Michigan-Wisconsin alone serves consumers in Missouri, Iowa, Michigan and Wisconsin, and consumers of gas carried by Panhandle Eastern Pipe Line Company reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433-434 (1947).

Another effect upon interstate commerce should be noted, namely, that the tax is related arithmetically to the volume of such commerce. Since the tax is fixed at 9/20 of a cent per m. c. f. of gas of which Michigan-Wisconsin "takes possession" for transportation through its pipeline, and since *all* of the gas so taken moves immediately and directly in interstate commerce, the result is that the tax is measured strictly by the amount of interstate commerce which appellant carries on.

Just as in the cases where a state has taxed the entire gross receipts derived from interstate commerce, the "gathering tax" is measured not only by the amount of business done within the state but by the amount done in other states as well. That is, the 9/20 of a cent per m. c. f. obviously does not attempt to measure the activities carried on by Michigan-Wisconsin within the State of Texas. Appellant pays as much in taxes per unit of volume for the "privilege" of taking possession of gas which it transports a mere 1.74 miles to the Oklahoma line and a thousand miles beyond as is paid by a company which operates a pipeline 500 miles within Texas and only five miles beyond. The words of Mr. Justice Stone, speaking for the Court in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434, 439, are therefore applicable *in toto* to the present tax:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state: If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce

is being done, the risk of multiple burden to which local commerce is not exposed."[9]

Similarly, in the present case, gas transported by a pipeline solely within the State of Texas would be subject to a single tax of 9/20 of a cent per m. c. f., whereas Michigan-Wisconsin would be subject to an additional tax on a comparable fictitious "local activity" in every state through which its pipeline runs. It is nonsense to say that only Texas could lay such a tax because it is the state of origin of the commerce. If Texas may impose a tax upon pipelines for the privilege of "taking or retaining possession" of the gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for "taking or retaining possession" of the gas within that state, or on any other activity within that state which contributes to the interstate movement of the gas—and so may Missouri, Iowa, Michigan and Wisconsin.

The fact that Congress considers the activities of Michigan-Wisconsin and other interstate pipeline companies to be within the sphere of national interest is indicated by the terms of the Natural Gas Act.[10] Michigan-Wisconsin could not have laid a foot of pipe in Texas or elsewhere for use in the interstate transportation of gas without first having obtained a certificate of convenience and necessity from the Federal Power Commission, and the rates at which it sells gas to distribution companies at the termini of its line are subject to the Commission's regulation.

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[9] The Court also noted: Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state *and burdens the commerce in direct proportion to its volume.*" 305 U.S. at 438. (Emphasis supplied)

[10] Title 15 , U.S.C., Sec. 717 (a).

In this connection, the sale of gas by Phillips to Michigan-Wisconsin, which is coincident with the "taking" of the gas by appellant under the Texas statute, was the subject of a very recent decision of the Court of Appeals for the District of Columbia. *Wisconsin* v. *Federal Power Commission,* No. 11,247, decided May 22, 1953. The question there involved was whether the Federal Power Commission, under the Natural Gas Act, has jurisdiction over that sale, or whether it is a part of the actual "gathering" process conducted by Phillips and thus exempt under the terms of Title 15 U. S. C., Section 717(b). The Court of Appeals held that the Commission has jurisdiction over such sale under the Act. It is significant for present purposes that the Court and all parties to that litigation, including the Commission itself, agreed that the sale and delivery from Phillips to Michigan-Wisconsin are a sale and delivery in interstate commerce. Thus, there was unanimity in the view that the sale and delivery by which Michigan-Wisconsin is enabled to "take possession" of the gas—the act for which it is taxed by Texas—are a sale and delivery in interstate commerce.

It is submitted that the Texas "gathering tax" is violative of the basic purposes and precepts of the Commerce Clause. It has accomplished what its sponsors desired, namely, to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." But purposes of this kind are precisely what the Commerce Clause was designed to prevent.

3. The Decision of the Court of Civil Appeals Is Contrary to This Court's Decisions

In referring to the decisions of this Court which were cited in the briefs of the parties, the Court of Civil Appeals said, "None of these cases is factually in point," and the Court added that its decision must therefore "turn upon

a practical application of basic principles adduced from these authorities to the facts."[11] Insofar as the Court's opinion is capable of rationalization, it appears to rest upon the theory that the taking possession of gas for transportation is a "local activity" separate from interstate commerce and thus not subject to the prohibitions of the Commerce Clause. Aside from the quotation of general statements from certain of this Court's opinions, the Court of Civil Appeals apparently placed sole reliance upon *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165 (1932), where the *generation* of electric power was held to be sufficiently separate from its *transmission* to sustain a state tax. Cf. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83 (1927).

The attempted isolation of a pretended or fictitious "local activity" engaged in by an interstate business as the incident to be taxed has been a favorite but futile device by which attempts have repeatedly been made to circumvent the Commerce Clause. This Court stated in *Nippert* v. *Richmond,* 327 U.S. 416, 423 (1946):

> " . . . If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an Act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which

[11] Appendix A, *infra;* 255 S.W. 2d at 543.

> it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

That the State of Texas did in this case "carve out from what is an entire or integral economic process" a particular phase or incident, which it has labeled as "separate and distinct" or "local" cannot be gainsaid. *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, 393 (1952). It is argued that the act of "taking possession" of gas for transmission interstate through a pipeline is separate and distinct from that transmission. How can a carrier possibly transport goods unless it first "takes possession" of them? One can readily visualize *production* of a commodity without transportation, and it is on this basis that taxes on *production* of goods for subsequent transportation in interstate commerce have been sustained. *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165, 180, 182 (1932); *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284, 288 (1927); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172, 178 (1923).[12] But is it possible to visualize the transportation of an article apart from the carrier's taking possession of the article? Under any conceivable view of the economic process of transportation, one is an inseparable, invisible part of the other.

That, certainly, has always been this Court's view of the process of "taking possession" of goods for interstate com-

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[12] The very distinction which the Court of Civil Appeals refused to recognize is specifically drawn in the *Pfost* case, upon which the state court relied. In that case this Court stated: "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." 286 U.S. at 180-181.

merce. In the so-called "stevedoring cases," *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down state statutes which levied a tax upon the receipts of companies engaged in loading ships for interstate commerce. In its opinion in the earlier case this Court pointed out:

> "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.
>
> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination . . . " 302 U.S. at 92.

And in the *Carter & Weekes* case, this Court said:

> " . . . The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-8.

It is not without significance that the Court of Civil Appeals, in describing Panhandle Eastern's activities, stated that "Panhandle *loads* its interstate pipeline with gas from the outlets of three gasoline plants, . . ."[13] It is this very act of "loading its pipeline" upon which the State of Texas has placed an occupation tax, despite the fact that this Court has said that interstate commerce, "at the least, begins with loading and ends with unloading."

Similarly, in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196 (1885), this Court struck down a state tax upon a

[13] Appendix A, *infra;* 255 S.W. 2d at 539; emphasis supplied.

ferry company operating between Philadelphia and Gloucester, New Jersey, saying:

> "... the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of persons or property at some point and putting them down at another.* A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." 114 U.S. at 203. (Emphasis supplied)

This statement is a conclusive answer to the contention that interstate pipeline companies may constitutionally be taxed for the privilege of receiving gas into their pipelines, which is the method by which they "take possession" of the gas. The activity of receiving gas for interstate transportation is not "local" in the sense that it is one that is carved out of the integral economic process of the transportation itself.

Once the gas is "taken" by Michigan-Wisconsin at the mouth of its pipeline, the gas can have but one destination—the ultimate markets in Missouri, Iowa, Michigan and Wisconsin. This is true, first, because the pipeline has no other outlets within (or without) the State of Texas through which gas might be diverted, and, second, because appellant's certificates of convenience and necessity specify points outside Texas to which and to whom the gas must be delivered. This case thus presents the ultimate in certainty of interstate destination from the moment Michigan-Wisconsin takes possession of the gas.[14]

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[14] As a matter of fact, the destination of the residue gas purchased by Michigan-Wisconsin from Phillips is fixed from the moment it leaves the

This case also presents the ultimate in continuity of interstate movement. As indicated above, the parties have stipulated, and the Court below noted:

> "The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipelines to consumers in Michigan and Wisconsin is a steady and continuous flow." (Appendix A, *infra;* 255 S.W. 2d at 539.)

There is no storage here involved, no break, no hesitation, but a continuous even movement into appellant's pipeline, through its compressor station and across the state line.[15]

There remains one statement in the opinion of the Court of Civil Appeals about which comment should be made. At the conclusion of its opinion, the Court stated:

> "The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time the gas is finally committed to its interstate journey." Appendix A, *infra;* 255 U.S. 2d at 546.

Appellant is frankly at a loss to know what "further processing" Michigan-Wisconsin conducts in the State of Texas —or anywhere else. After the gas enters Michigan-Wisconsin's lines it goes immediately into a compressor station and thence into appellant's 24-inch line and immediately across the state line into Oklahoma.

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wellhead, since Phillips is bound by contract to deliver to Michigan-Wisconsin the residue gas from all wells drilled in acreage "dedicated" to the latter. *Eureka Pipe Line Co.* v. *Hallanan,* 256 U.S. 265 (1921); *United Fuel Co.* v. *Hallanan,* 257 U.S. 277 (1921); *Peoples Natural Gas Co.* v. *Pub. Serv. Com.,* 270 U.S. 550 (1926).

[15] Under circumstances of similar continuity of movement and certainty of destination, this Court had "no doubt" that the movement of gas was in interstate commerce. *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 687 (1947).

If, by "further processing," the Court meant the operation of appellant's compressor station, the statement is without foundation. The only purpose of the compressor station, as this Court knows, is to build up pressure sufficient to move the gas along the pipeline.[16] It supplies the motive power by which interstate commerce is conducted, just as a locomotive, a truck-tractor or a ship's turbine supplies the motive power for those forms of transportation. The Court of Civil Appeals itself noted earlier in its opinion:

> "The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin *and used exclusively by it in the taking and transportation of such gas.*" Appendix A, *infra;* 255 S.W. 2d at 539.

It is familiar law that facilities used in effectuating the interstate movement of goods are themselves in interstate commerce. Referring to the use of such facilities as a "processing" operation cannot change the facts, or the application of the Commerce Clause to the facts.

Moreover, contrary to the assertion of the Court below, the gas is "committed" to interstate commerce before it enters the compressor station in every conceivable sense of the word. It can go nowhere else, physically or contractually, from the moment it enters Michigan-Wisconsin's lines at the outlet of the Phillips gasoline plant. *Hughes Bros. Timber Co.* v. *Minn.*, 272 U.S. 469, 475-6 (1926). It does so invariably, unceasingly, unhesitatingly. How the gas could be more firmly "committed to interstate commerce" than is the case when appellant takes possession of the gas from Phillips is quite beyond comprehension.

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[16] In *Interstate Natural Gas Co.* v. *Federal Power Commission* (Note 15 *supra*), this Court stated that "the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin." 331 U.S. at 689.

Conclusion

Appellant respectfully suggests that enough has been presented to demonstrate that this appeal, and that filed by Panhandle Eastern Pipe Line Company in a companion case, bring before this Court a question under the Commerce Clause that is far reaching and important, both in terms of legal principles and of practical impact upon the consumers of gas throughout the nation.

In order to "tax the pipeline gas that goes out of the State of Texas," (House Journal, June 1, 1951, p. 2979), the state legislature has conjured up a fictitious name and a fictitious "local activity" upon which to impose the tax. The residents of the consuming states had no voice in that determination. But they had spoken over 150 years ago when their representatives drafted a Constitution which provided that no state may take any action which has the effect "of impeding the free flow of trade between the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). Judged by that standard, Section XXIII of H.B. 285, the Texas "gathering tax" statute, cannot stand.

Respectfully submitted,

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APPENDIX "A"

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 10,116

ROBERT S. CALVERT, Comptroller et al., *Appellants,*

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, *Appellee*

No. 10,117

ROBERT S. CALVERT, Comptroller et al., *Appellants,*

vs.

MICHIGAN-WISCONSIN PIPE LINE COMPANY, *Appellee*

No. 10,118

ROBERT S. CALVERT, Comptroller et al., *Appellants,*

vs.

AMARILLO OIL COMPANY, *Appellee*

OPINION—Feb. 4, 1953

From District Court of Travis County, 126th Judicial District, Nos. 91,332, 91,338 and 91,508, Respectively

Hon. Jack Roberts, Judge

These three causes in all of which Texas officials Robert S. Calvert, Comptroller of Public Accounts, Price Daniel, Attorney General and Jesse James, State Treasurer, are appellants and the Panhandle Eastern Pipe Line Company is appellee in Cause No. 10,116, the Michigan-Wisconsin Pipe Line Company is appellee in Cause No. 10,117 and the Amarillo Oil Company is appellee in Cause No. 10,118,[1] were

[1] These appellees will be hereinafter referred to as Michigan-Wisconsin, Panhandle and Amarillo, respectively.

consolidated for trial below, were consolidated in this Court for hearing and argument and will all be disposed of by this opinion.

These suits were all brought under and in compliance with Art. 7057b, Vernon's Annotated Civil Statutes of Texas, authorizing and regulating institution of suits for the recovery of license and privilege taxes paid under protest.

Each appellee sought recovery of taxes paid under protest, such payments having been made in obedience to the provisions of Art. 7057f, Vernon's Annotated Civil Statutes of Texas.[2]

Trial below was nonjury and resulted in judgments for appellees for recovery of the sums for which they sued.

Findings of fact and conclusions of law were not requested of nor filed by the trial judge.

The single question presented for our decision is whether Article 7057f, a revenue statute, the pertinent portions of which are set out below,[3] as applied to the business activities

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[2] Sec. XXIII, H.B. 285, Chapter 402, page 740, Acts of 1951, 52nd Legislature of the State of Texas.

[3] "Art. 7057f. Occupation tax on business of gathering gas. Definitions: Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22, and 23 and Texas Laws 1947, Chapter 359, on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

"(a) 'Gas' means natural and casing-head gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

"(b) 'Casing-head gas' means any gas or vapor indigenous to an oil stratum and produced from such stratum with oil.

"(c) 'Gathering gas' means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or

of appellees, violates the commerce clause of the Constitution of the United States.[4] If so it is void, if not it is valid.

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private or otherwise after such gas has passed through the outlet of such plant.

"(d) 'Gatherer' means any person engaged in the gathering of gas.

"(e) 'Person' means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trusts.

"(f) 'Cubic foot of gas' or 'standard cubic foot of gas' shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

"Imposition of tax; amount; calculation.

"Sec. 2. In addition to all other licenses and taxes levied and assessed in the state of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

"In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field operations; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

"Payment; penalty for delay.

"Sec. 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time above prescribed, the amount due shall become delinquent and a penalty of ten percent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date due until paid.

"Unlawful to require producer to pay.

"Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the producer amounts paid by the gatherer to deduct from sums owed the producer amounts paid by the gatherer by reason of the imposition of a tax on production. . . .

"Sec. 11. In the event the tax levied by this section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

[4] Section 8 of Article I of the Federal Constitution provides that Congress shall have the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." (C1.3).

Each appellee is engaged in the business of transporting natural gas by pipe line. There is no dispute as to the manner in which their business activities were conducted. These matters were stipulated. Since Michigan-Wisconsin presents the strongest factual position favorable to appellees we will fully describe it and its activities first.

Michigan-Wisconsin is a natural gas company as defined in the Federal Natural Gas Act and holds certificates of convenience and necessity issued by the Federal Power Commission. Such certificates authorize it to engage in interstate transportation and sale of natural gas. It has constructed a pipe line which originates at a point in Hansford County, Texas, and which terminates at various points in the States of Michigan and Wisconsin. At these points, and at other points in the States of Missouri and Iowa, it sells natural gas to distribution companies which serve markets in those areas. It sells no gas in Texas.

Michigan-Wisconsin produces no gas in Texas or elsewhere. Rather, it supplies its markets by purchasing gas from Phillips Petroleum Company. Through a network of pipe lines, Philips brings natural gas from the wells from which it is produced to its Sherman gasoline plant located in Hansford County, Texas. At this plant, certain liquefiable hydrocarbons are removed from the gas, and, at the outlet side of the plant, Phillips sells the gas to Michigan-Wisconsin.

Under contracts between Phillips and Michigan-Wisconsin, Phillips obligates itself to deliver to Michigan-Wisconsin all of the requirements for the latter's pipe line, up to a maximum of 343 million cubic feet daily. To secure performance of this agreement, Phillips has dedicated all of the gas underlying certain lands described in the contracts, and with minor exception, has agreed that it will sell no gas from such lands to anyone except Michigan-Wisconsin.

In these contracts, Phillips reserved the right to extract certain liquenable hydrocarbons from the raw gas. This extraction is performed by Phillips with absorbers at its gasoline plant. When the gas leaves the absorbers it flows through pipes owned by Phillips for a distance of 300 yards to the outlet of the gasoline plant. When the gas emerges from the outlet, it flows directly into the pipe line of

Michigan-Wisconsin, and it continues flowing through the Michigan-Wisconsin pipe line system until it reaches markets in other states.[4a] This pipe line is in the State of Texas for only 1.74 miles, the remainder being in other states.

The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported.

It was further stipulated by the parties:

> "Natural gas in going through a gasoline plant or other process to separate oil, gasoline or other liquid hydrocarbons or to extract hydrogen sulphide or carbon dioxide or any other element undergoes certain changes, both in quality and quantity. Among the changes are these: The residue gas leaving the extraction or separating device is usually at a lower pressure, the temperature is sometimes higher, and the specific gravity of the gas is less than that of the natural gas which enters such plant. There are differences between the proportion of the methane content, the ethane content and the content of other hydrocarbons. Likewise, when the hydrogen sulphide or carbon dioxide are extracted,

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[4a] This gas after its delivery to Michigan-Wisconsin at the outlet of the processing plant travels through two 26-inch pipe lines a distance of approximately 1215 feet to a compressor station owned and operated by Michigan-Wisconsin at which station the pressure of such gas is raised from approximately 200 pounds to approximately 975 pounds. In the compressor station the gas is compressed, cooled, scrubbed and dehydrated in the course of the flow through the station. At the outlet of such compressor station, such gas passes into Michigan-Wisconsin's 24-inch pipe line, flowing through such pipe line approximately 1.74 miles to the Texas-Oklahoma line and continuing through such pipe line to markets outside the State of Texas.

there is a percentage variance in the constituents remaining in the gas. In addition to these changes in constituents, the volume of the residue gas is less than the volume of the natural gas which enters the extraction plant due to the removal of some of the constituents of the natural gas."

Except for minor variations Panhandle conducts its activities in the same manner as Michigan-Wisconsin. Panhandle loads its interstate pipe line with gas from the outlets of three gasoline plants, rather than with gas from only one plant; it produces a portion of the gas which it takes at the outlet of one of such plants; and it makes sales in Texas to three small customers, rather than sending all of its gas outside the State.[5]

Amarillo produces no gas. It purchases gas produced in Texas and transports it by pipe lines in intrastate commerce only.[6]

Regarding the natural gas business in Texas it was stipulated that:

"But for the Texas oil and gas conservation statutes, and the enforcement by the Railroad Commission of Texas, producers in the field could drill as many wells as they desired and could open their wells at the rate of 100% open flow and could burn both the sweet and sour gas for the production of carbon black, or they could extract the gasoline and other liquid hydrocarbons in a gasoline plant and flare the residue gas. If this happened, the gas in the reservoir would become depleted in the course of a few years. If only a portion of the producers in the field drilled additional wells and operated such wells at 100% open flow, such producers would in the course of a few years drain the gas from under the acreage of the producers who were not also producing at 100% open flow from a proportionate number of wells. After such field should be depleted,

[5] A schematic diagram of the operations of Michigan-Wisconsin and Panhandle is attached to and made a part of this opinion.

[6] Amarillo's only ground of protest is based on Sec. 11 of Art. 7057f, copied supra.

> neither Michigan-Wisconsin nor any other purchaser of gas could supply its market demand with gas from such fields and the same would be true with respect to any other field in the state which might be subjected to the same rapid depletion in the absence of the Texas oil and gas conservation statutes and the enforcement thereof."

Stipulated too was that the State of Texas exercises control and jurisdiction over the drilling, completing, and production of oil and gas wells, and over the plants that extract gasoline or other liquid hydrocarbons from gas, and that neither the Congress of the United States, the Federal Power Commission, nor any other Federal Agency has by any law, rule or regulation exercised any control or jurisdiction over such activities.

William James Murray, Jr., a petroleum engineer by profession and a member of the Railroad Commission of Texas, the state agency which enforces oil and gas conservation statutes, testified, without contradiction, at length regarding the special benefits conferred upon the gas industry by such statutes and their enforcement.

After recounting the successful efforts of the Railroad Commission in curtailing the flaring and wasting of gas[7] Mr. Murray was interrogated as follows:

> "I would like for you to explain if it is a fact how the State of Texas, by virtue of the oil and gas conservation statutes and their enforcement by the Railroad Commission, has given any opportunities, if it has, and afforded any protection or conferred any benefits upon those who take or retain gasoline—gas at the outlet of a gasoline processing plant for transmission through pipelines? Has the State of Texas conferred any benefits or privileges to those people by virtue of its conservation laws?

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[7] That Texas courts had a part in these efforts see *Railroad Commission* v. *Shell Co. Inc.*, 146 Tex. 286, 206 S.W. 2d 235; *Railroad Commission* v. *Sterling Oil and Refining Co.*, 218 S.W. 2d 415, 147 Tex. 547, and *Railroad Commission* v. *Flour Bluff Oil Corporation*, 219 S.W. 2d 506 (Austin C.C.A., writ ref.).

"A. Yes, I think very material benefits.

"Q. Will you explain in detail what those benefits are?

"A. Well, partially my explanation would involve repetition of my statement earlier, that an interstate or intrastate pipe line must spend a tremendous amount of money in laying these facilities, and therefore, they have got to have assurance of long life reserves, and by preventing waste of gas, by increasing recovery of gas, we have given them the assurance of these long life reserves, which have made it possible for them to build the lines and for them to reap great profits from it. I could illustrate, back years ago when we were flaring so much gas from the Panhandle, you remember I mentioned at one time we were flaring a billion feet of gas a day, and here gas was just going to waste, and cities back East were very desirous, much in need of natural gas, but you couldn't afford to build a pipe line from the Chicago area, for example, to the Panhandle, even though the gas was so cheap they were just blowing it into the air instead of saving it. You could get your gas for nearly nothing, but you couldn't afford to build a pipe line down there because that field wasn't going to last long enough under the poor conservation practices to pay out the line, even though they could have been given the gas, and then when legislation and Commission regulation that wastage of gas was stopped, and it became apparent that when the reserves of the Panhandle were going to be required to be wisely utilized, they could then see that they had reserves for many years. We will talk in the terms of 25 years, and so a great number of gas pipe lines began to be built. I very keenly feel that conservation has made it possible, made it financially practical for these intercontinental, transcontinental pipe lines to come into business, and I trust I have made my answer clear in that phase. Now, after the day of stopping the flaring of gas, the Commission's regulation of casinghead gas, and our drive to stop the flaring of casinghead gas had gone hand in glove with the building of

new interstate gas pipe lines to come get this casinghead gas. I regret I don't have in mind the reserves of the state, but nearly fifty per cent, if I recall correctly, of the gas reserves of this state is casinghead gas. Excuse me. There is nearly fifty per cent as much casinghead gas reserves as there is natural gas reserves. Well, there, when you start using casinghead gas instead of just blowing it to the air, look how tremendously you have increased the potential reserves of gas in Texas which are available to supply these interstate pipe lines, and the report of the Gas Conservation Engineering, on which I was privileged to serve, has been used in rather numerous Federal Power Commission hearings showing how much casinghead gas was being produced and flared down in Texas and how the Railroad Commission was planning to force the curtailment of that waste, and that therefore these reserves would be available for dedication to these pipe lines. . . .

"Q. Mr. Murray, I believe you stated that in your opinion, that in the absence of our state conservation laws and the enforcement by the Railroad Commission, that it would not have been economically feasible to have built a long line of pipe line to come in and get natural gas. I believe you stated that, didn't you?

A. Yes, sir. . . .

A. My answer was yes, that I had so stated, both that in my opinion, and historical events demonstrate that it was true that they could not build them in the absence of those regulations, and the pipe lines began to be built only after the regulations.[8]

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[8] This latter statement was modified on cross examination, Mr. Murray saying:

"I have previously explained my lack of clarity yesterday in my thinking and my understanding of just what we were restricted to, and I was largely discussing general principles as applicable to the State as a whole. I do not retract in the slightest the general statement that it is not feasible to build a transcontinental pipe line into an area where terrific waste will take place. I may have left the impression that no pipe lines were built into the Panhandle until after the waste had been stopped. I actually didn't have in mind the dates when all of the lines were built into the Panhandle, but

Q. I will ask you to state in your opinion what would the effect be upon those that are now taking and retaining the gas for transmission to the eastern and northern states, if the State of Texas repealed its conservation laws at this time or just failed to enforce them?

A. If all of the oil and gas conservation laws were repealed or there was no enforcement of the laws, the effect on these pipe lines, in my judgment, would be to cause great loss of investment. I don't think any of the recently built pipelines which have not been paid out would ever be amortized, and there would be also a great suffering on the part of the consumers who are dependent upon these sources of supply of gas. . . ."

Another benefit accruing to purchasers of gas in Texas and credited to its regulation of the industry was that of making nominations for gas to satisfy market demand about which Mr. Murray testified:

". . . In your opinion, Mr. Murray, does this privilege conferred upon takers of gas or the folks that are retaining gas for transmission in both interstate and intrastate commerce, to make nominations in order to measure the—meet their market demands, do you consider that a valuable right and privilege?

"A. Oh, yes, very definitely, for the purchaser. The whole point of the nominations is to assure to the purchasers of gas within the limits of ratable take, that they will get the gas that they need. As far as the producer is concerned and the Commission is concerned, we could just set a fixed amount of gas each month and allow them to produce that amount of gas each month,

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a good many of those lines, as was brought out on cross-examination, were built prior to the beginning of the large amount of wastage in the Panhandle, and I can state that those lines would have been severally adversely affected, those lines already built, had the waste which began to occur after the lines were built had been allowed to continue. It is doubtful in my judgment whether the lines would ever have been able to amortize, if waste had continued at the maximum rate at which gas was wasted from the Panhandle Field."

it would be a whole lot easier on the producer and a lot easier on the Commission, but it wouldn't assure the purchaser the gas he wants, and so we go to a tremendous amount of trouble and calculations in order to see that always the purchaser is getting the gas that he wants. Consequently I do consider it a very valuable right and privilege, and if I might amplify my answer a while ago, the Legislature specifically for the benefit of the pipeline passed an over and under six months balancing provision, so that in the case I mentioned a while ago, while there was—say, the Carthage Field where there are several pipelines, if a producer doesn't happen to have connections to sufficient wells to give him as much allowable as he needs during a particular month, he can overproduce. The Legislature said that is all right, and the Commission says that is all right. It is kind of like an overdraft at the bank, and then the next month, if his demand has fallen off, he may have too much gas, and then he underproduces and makes up his overdraft, and he can overdraw for a period of six months, and then have six months in which to make it up. Now, if in the period of a year's time you don't balance out, why, then, we begin to start cutting them off, and say: 'Look, you just might as well get out and hustle you some more gas.' Just like your banker will take care of your overdraft for a while, but not indefinitely, but that has gone a long ways toward solving the problem of the Commission requirement that ratable take exists between the producers, and affording these various pipelines serving a single field the ability to get gas whenever their particular customers demand it, and I do consider that a very valuable right and privilege to the gas companies."

The point at which maximum benefits of State regulation was attained was fixed by Mr. Murray as being at the outlet of the processing plant, his testimony in this regard being:

"In the case of either gas well gas or casinghead gas that is processed in a plant for the extraction of gasoline or other liquid hydrocarbons, at which place could

such gas be taken or retained by a person for transmission so that the person so taking or retaining for transmission would receive the maximum benefit of whatever benefits he does receive from the enforcement of our state oil and gas conservation statutes?

"A. Well, I would say obviously the maximum benefit would be at the outlet of the plant, because the plant itself operates under the Commission's conservation regulations, and benefits accrue from these regulations of the operation of the plant, and so my answer the point at which the maximum benefits occur would be after the gas has been finally processed through the plant, at the outlet of the plant.

"Q. Where gas is produced and flows from the well head to a plant that separates the gasoline or other liquid hydrocarbons therefrom, where is the first place that gas could be taken or retained for transmission that such gas is in the best or proper condition to be transmitted by a pipeline for any considerable distance?

"A. Well, now, I am assuming from your question by the fact that the gas is processed in a plant that it needs to be processed in a plant, and consequently gas which has sufficient liquid content that it requires processing isn't in suitable condition for long distance transportation until it has been processed, and therefore it obviously follows that the first time the gas is suitable for transmission, bearing in mind I am predicating it on it being wet gas to start with, is after it has been processed through a plant. Now, by further explanation that there are dry gas wells which do produce gas that is suitable in its condition as it comes from the well head to be transmitted through a pipeline, but you don't process that kind of gas in a gasoline plant, so when you told me that it was being processed, it obviously followed that it is only suitable for transmission after it has been processed.

"Q. You said after it has been processed. Do you mean by that at the outlet of the gasoline plant?

"A. Yes, sir, at the outlet of the gasoline plant."

So much for the facts.

The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supreme Court of the United States.

Our conclusions, presently to be stated, have been reached after a painstaking study of all the Federal Supreme Court decisions which have been cited by the parties. None of these cases is factually in point. This case then must turn upon a practical application of basic principles adduced from these authorities to the facts. As stated by the court in *Union Brokerage Company* v. *Jensen:*[9]

> "We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances. To review them to any extent would be writing the history of the adjudicatory process in relation to the Commerce Clause."

Similarly in *Utah Power and Light Co.* v. *Pfost:*[10]

> ". . . we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical considerations."

The problem of the federal courts in this field of litigation has been "to reconcile competing constitutional de-

[9] 322 U.S. 202, 88 L. ed. 1227.

[10] 286 U.S. 165, 76 L. ed. 1038.

mands so that commerce between the states shall not be unduly impeded by state action, and that the power to levy taxes for the support of state government shall not be unduly curtailed." [11]

It is certain that the State may not for revenue purposes levy a direct tax upon the privilege of engaging in interstate business.[12]

It is equally certain that:

> "(But) it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 US 250, 254, 82 L. Ed. 823, 826, 58 S. Ct. 546, 115 ALR 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress." [13]

After referring to various decisions the Court continued:

> "In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers

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[11] *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U.S. 33, 84 L. ed. 565.

[12] *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 95 L. ed. 573. However, money payments burdening interstate commerce may be exacted by the State as reimbursement for providing facilities and enforcing lawful regulations of commerce. *Ingels* v. *Marf*, 300 U.S. 29, 81 L. ed. 653.

[13] *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U.S. 33, 84 L. ed. 565.

reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed."

In *Memphis Natural Gas Co.* v. *Stone*,[14] it was said:

"The federal courts have sought over the years to determine the scope of a state's power to tax in the light of the competing interests of interstate commerce, and of the states, with their power to impose reasonable taxes upon incidents connected with that commerce. See Gwin, White & Prince v. Henneford, 305 U. S. 434, 441, 83 L. Ed. 272, 277, 59 S. Ct. 325. We continue at that task, characterized long ago as an area of 'nice distinctions.' . . .

"The cases just cited in the note show that, from the viewpoint of the Commerce Clause, where the corporations carry on a local activity sufficiently separate from the interstate commerce state taxes may be validly laid, even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon the interstate business itself. But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. Nippert v. Richmond, supra (327 U. S. at 423, 90 L. Ed. 764, 66 S. Ct. 586, 162 ALR 844). The incident selected should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce."

and the Court concluded:

"We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its bord-

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[14] 335 U.S. 80, 92 L. ed. 1832.

ers. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, give protection and that state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In *Spector Motor Service* v. *O'Connor*,[15] it is said:

"It is not a matter of labels. The incidence of the tax provides the answer."

The incidence of the tax here is, according to the statute, the gathering of gas, defined to be:

". . . the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of appellees who

[15] 340 U.S. 602, 95 L. ed. 573.

transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution.

Considered from a practical point of view, we think not.

If the incidence of the tax here was the production of gas there would be no question about the validity of the statute.[16] The tax here is not so laid. In fact the statute makes unlawful the saddling of this tax upon the producer. The reason for this is to be partly found in references in legislative debates to the "already overtaxed landowner, royalty owner and producer."[17] This situation could only result from long term commitments to sell gas at low prices, otherwise the Legislature would not have been so solicitous for the welfare of the producer for if the producer could pass on to the consuming public a tax increase then his position would not be one of hardship.

If on the other hand the Legislature was impotent to levy a tax relating to this gas because, as appellees contend, it "is in interstate commerce from the time it leaves the mouths of the wells" then the only legislature alternative was to levy an additional production tax without regard to the disasterous effect which might be visited upon producers.

There is nothing illegal nor immoral in the enactment of tax laws with the knowledge and expectation that those upon whom the tax initially falls will make recoupment from others.[18] Most excise taxes are of this nature and unless they can be passed on to the consumer the manufacturer or producer could not long survive.

Of course landowners and producers of gas could have protected themselves by contract but when gas was so worthless as to be flared at the rate of a billion cubic feet daily from one Texas field it is small wonder that producers

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[16] *Hope Natural Gas Company* v. *Hall*, 274 U.S. 284, 71 L. ed. 1049.

[17] House Journal, June 1, 1951, p. 3350.

[18] *Texas Company* v. *Brown*, 258 U.S. 466, 66 L. ed. 721.

and owners did not quibble over contract terms when anything at all was offered for their gas.

We also have the firm conviction that the power of the State, employed through the exercise of legislative discretion, to select local incidents related to interstate commerce for the purpose of taxation should not be limited or defined by the physical properties or characteristics of the subject matter which in this instance is natural gas.

As we view it these characteristics form the basis for appellees' conclusions that the gas here moves in a continuous flow from the mouths of the wells in interstate commerce. The same reasoning could send the interstate commerce label down the well and into subterranean chambers where the movement of gas actually commences. The mouth of the well is merely an arbitrary point along the road traveled by the gas. There is no legal reason known to us for fixing the mouth of the well as the dividing line separating State and Federal jurisdictions in matters of commerce and taxation.

It is the nature of gas, since it is lighter than air, to move when relieved of pressure. Stationary gas has no utilitarian value. Such value is attained only when gas moves in a steady and continuous flow. Nor can gas be economically stored except in its natural reservoirs. The movement of gas has no necessary relation to interstate commerce or to commerce at all. It moves, willy nilly, if not contained.

A similar problem was solved by the Court in *Utah Power and Light Co.* v. *Pfost* [19] where it was held that generation of electricity was a local activity not inseparably related to its transmission, the Court saying:

> "While conversion and transmission are substantially instantaneous, they are, we are convinced, es-

[19] 286 U.S. 165, 76 L. ed. 1038.

> sentially separable and distinct operations. The fact that to ordinary observation there is no appreciable lapse of time between the generation of the product and its transmission does not forbid the conclusion that they are, nevertheless, successive and not simultaneous acts."

Here there is contractual interference with the transmission of the gas in interstate commerce until after the gas has emerged from processing plants as well as actual interference caused by the processing itself.[20] That there is no appreciable lapse of time between processing of the gas, the taking or retaining of the gas and its transmission is, as we have seen, unimportant since they are successive and not simultaneous acts.

We believe that the tax levied by this statute is fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described. We also believe that this statute represents an exercise of legislative discretion with which the Constitution of the United States does not require and the courts should not command interference. The statute, to us, seems to reflect a sincere effort on the part of the Legislature to deal fairly and justly with the State, its citizens and with all others who share in the enjoyment of one of the great though vanishing, exhaustible and irreplaceable natural resources of the State of Texas.

In passing upon the question before us we have borne in mind the admonition of Chief Justice Marshall that:

> "The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The mindful of the solemn obligations which that station

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[20] In *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172, 67 L. ed. 929, the Court said: "The ore does not enter interstate commeree until after the mining is done. . . ."

court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unimposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."[21]

We have no clear or strong conviction that this statute and the Constitution are incompatible.

The statute does not purport to, was not designed to and in fact does not interfere with the authority of Congress to regulate interstate commerce.

All that truthfully can be said of the statute is that it increases the cost of gas to the consuming public. There are few if any ad valorem, privilege or excise taxes which do not have similar effect in their respective fields. This, however, is not a defect.

The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Philips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time that the gas is finally committed to its interstate journey. Such event, that is the taking or retaining of the gas at the gasoline plant outlet, is just as local in nature as the production itself is local. The judicial consequences in each instance should be the same. We believe they are the same.

It follows that, in our opinion, the statute is valid.

The judgment in each of these cases is reversed and judgments are here rendered that the respective plaintiff therein take nothing by its suit.

ROBERT G. HUGHES,
Associate Justice.

Reversed and rendered. Filed: February 4, 1953.

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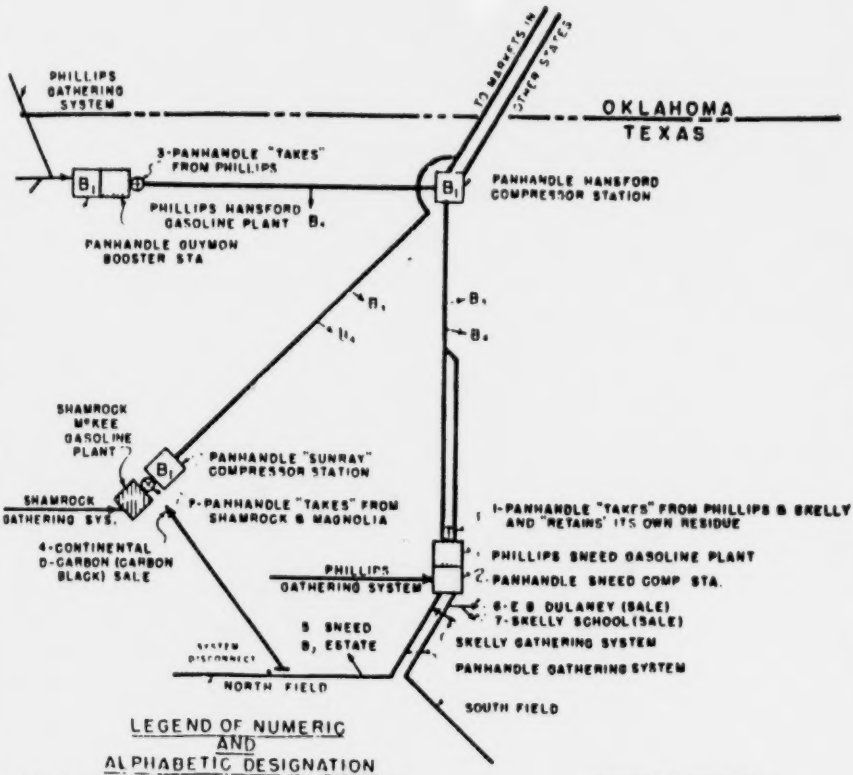
[21] *Fletcher* v. *Peck*, 6 Cranch 87, 3 L. ed. 162.

(Here follow 2 photolithographs)

"APPENDIX B" to Opinion

PANHANDLE EASTERN PIPE LINE COMPANY

GATHERING AND TRANSMISSION SYSTEM IN STATE OF TEXAS



LEGEND OF NUMERIC AND ALPHABETIC DESIGNATION

1-3 POINTS OF "TAKING" (OR RETAINING) RESIDUE GAS
4-7 POINTS OF "TAKING" RAW GAS FROM GATHERING SYSTEM
B_1 FIELD USE (DIRECT COMPANY OPERATION)
B_2 FIELD USE (LEASE HOLD OBLIGATION)
B_3 FIELD USE (RIGHT OF WAY OBLIGATION)
B_4 FIELD USE (INCLUDING USE LOSS)
D FOR MANUFACTURE (CARBON BLACK)

LEGEND OF SYMBOLS

- P.E.P.L. COMPRESSOR
- GASOLINE PLANT
- POINT OF PURCHASE
- FIELD DELIVERY

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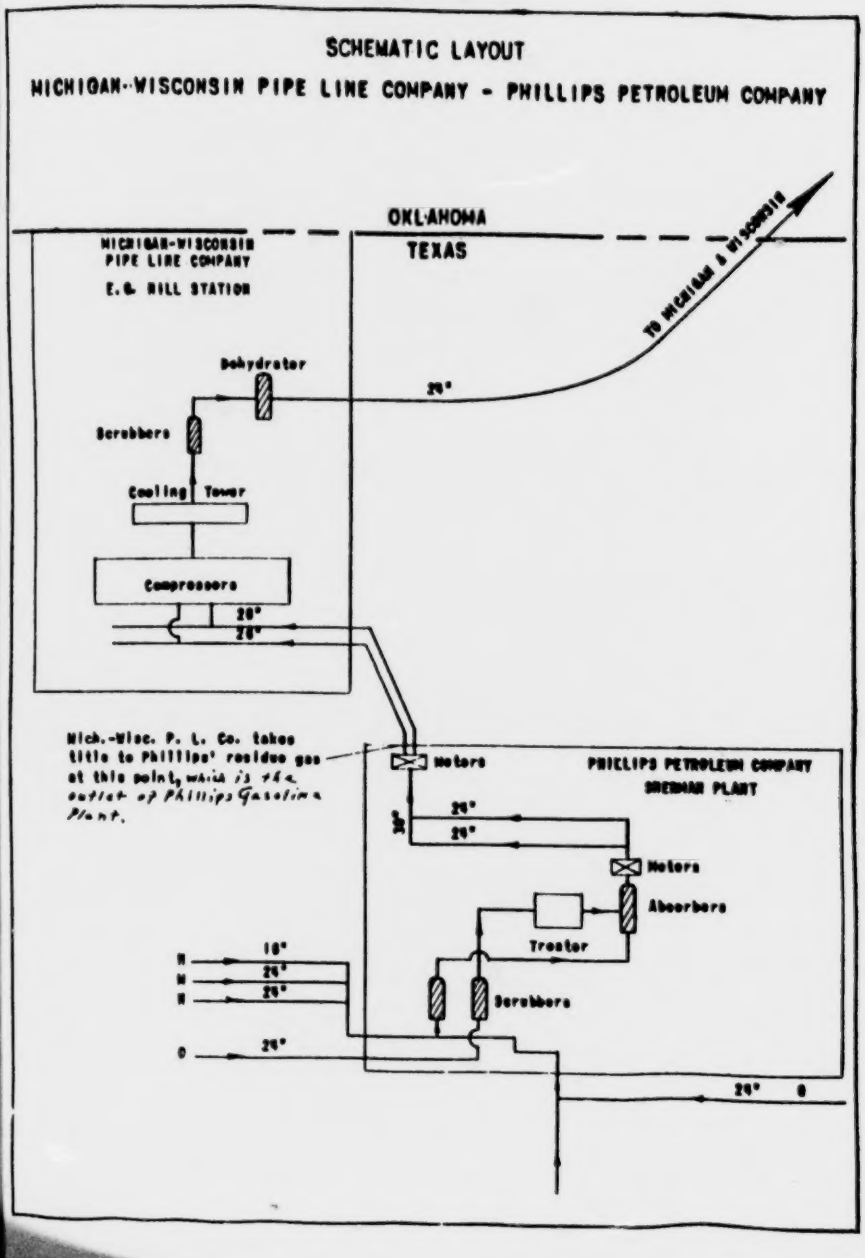
APPENDIX "B"



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APPENDIX "B"

COPY OF SECTION XXIII, H. B. 285, CHAPTER 402, ACTS OF THE 52ND LEGISLATURE OF TEXAS, 1951 (V.A.C.S. 7057f)

Art. 7057f. Occupation Tax on Business of Gathering Gas Definitions

Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22 and 23 and Texas Laws 1947, Chapter 359,[1] on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

(a) "Gas" means natural and casinghead gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

(b) "Casinghead gas" means any gas or vapor indigenous to an oil stratum and produced from such stratum with oil.

(c) "Gathering gas" means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term "gathering gas" means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant.

(d) "Gatherer" means any person engaged in the gathering of gas.

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[1] Article 23a.

(e) "Person" means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trusts.

(f) "Cubic foot of gas" or "standard cubic foot of gas" shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

Imposition of Tax; Amount; Calculation

Sec. 2. In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field operations; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

Payment; Penalty for Delay

Sec. 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time prescribed, the amount due shall become delinquent and a penalty of ten per cent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date until paid.

Unlawful to Require Producer to Pay

Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any

contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the producer amounts paid by the gatherer by reason of the imposition of a tax on production.

Records and Reports; Rules and Regulations

Sec. 5. It shall be the duty of each gatherer of gas in this State to keep accurate records within this State of all gas gathered and showing also what disposition is made of same, and to make reports to the Comptroller of Public Accounts of gas gathered upon forms prescribed by the Comptroller of Public Accounts. The Comptroller shall prescribe forms of reports to be made by such gatherers and to require that such reports be made on officially prescribed forms.

The Comptroller of Public Accounts shall have the power to prescribe such rules and regulations, and require such records and reports as may be needed to aid in the administration and enforcement of the Act.

Examinations and Investigations; Appropriations for Administration and Enforcement

Sec. 6. The Comptroller shall employ auditors and technical assistants for the purpose of verifying reports and investigating the affairs of gatherers to determine whether the tax is being properly reported and paid. He shall have the power to enter upon the premises of any taxpayer liable for a tax under this Act, and any other premises necessary in determining the correct tax liability, and to examine, or cause to be examined, any books, or records, of any person, subject to a tax under this Act, and to secure any other information directly or indirectly concerned in the enforcement of this Act, and to promulgate and enforce, according to law, rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law. Before any division or allotment of the occupation tax collected under the provisions of this Act is made, one fifth (1/5) of one per cent (1%) of the occupation tax paid monthly as may be needed in such administration and such enforcement is hereby appropriated for such purpose.

Delinquency; Injunction

Sec. 7. In the event any gas gatherer in this State shall become delinquent in the payment of the proper taxes herein imposed, or fails to file required reports with the Comptroller, the Attorney General by a suit in the name of the State of Texas shall have the right to enjoin such person from gathering gas until the delinquent tax is paid or said reports are filed, and the venue of any such suit for injunction is hereby fixed in the county where the offense occurs.

Violations; Lien; Ascertainment of Amount Due; Gas Audit Fund; Suits

Sec. 8. If any person shall violate any of the provisions hereof, he shall forfeit to the State of Texas as a penalty not less than Twenty-five Dollars ($25) for each violation and each day's violation shall constitute a separate offense. The State shall have a prior lien for all delinquent taxes, penalties, and interest on all property and equipment used by the gatherer of gas in his business of gathering gas, and if any gatherer of gas shall fail to remit the proper taxes, penalties, and interest due, or any of them, the Comptroller may employ auditors or other persons to ascertain the correct amount due, and the gatherer of gas shall be liable, as an additional penalty, for the reasonable expenses or the reasonable value of such services of representatives of the Comptroller, incurred in such investigation and audit; provided, that funds collected for audits and examinations shall be placed in a gas audit fund in the Treasury and shall constitute a revolving fund which may be used from time to time by the Comptroller in making such audits in addition to the general appropriation made for such purpose, and all of said funds to be placed in said gas audit fund are hereby appropriated for such purpose. The Attorney General shall file suit in the name of the State of Texas for all delinquent taxes, penalties, and other amounts due, and for the enforcement of all liens under this law; and the venue of any such suit is hereby fixed in Travis County.

Reports and Audits as Evidence; Sale or Transfer of Agreements

Sec. 9. (a) If any person liable for the payment of the tax hereby levied, or required to remit the same to the Comptroller of Public Accounts, fails or refuses to pay any tax, penalty, or interest within the time and manner provided by the Act and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claim in any judicial proceedings, any report filed in the office of the Comptroller by such gatherer or representative of said gatherer or a certified copy thereof certified to by the Comptroller showing the amount of gas gathered on which tax, penalties or interest have not been paid, or any audit made by the Comptroller or his representative from the books of said gatherer when filed and sworn to by such representative as being made from the records of said gatherer, such report or audit shall be admissible in evidence in such proceedings and shall be prima-facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be submitted in evidence only against the party by or from whom it was made.

(b) In the event the Attorney General shall file suit of claim for taxes, provided for in the foregoing, and attach or file as an exhibit any report or audit of said gatherer, and an affidavit made by the Comptroller or his representative that the taxes shown to be due by said report or audit are past due and unpaid and that all payments and credits have been allowed, then unless the party resisting the same shall file an answer in the same form and manner as required by Article 3736, Revised Civil Statutes of Texas of 1925, as amended by Chapter 239, Acts of the Regular Session of the Forty-second Legislature, said audit or report shall be taken as prima-facie evidence thereof, and the proceedings of said Article are hereby made applicable to suits to collect taxes hereunder.

(c) When any contract or agreement of gathering gas changes hands, the old gas gatherer shall note on his last report that said contract, or agreement has been sold or transferred, showing the effective date of said change and the name and address of the person who will gather gas

under said contract, or agreement and be responsible for the filing of reports provided for in this Act, and the new gas gatherer shall note on his first report that said contract, or agreement has been acquired, showing the effective date of said change and the name and address of the person formerly gathering gas under said contract, or agreement.

Disposition of Collections

Sec. 10. All moneys derived from and collected by the State of Texas, under the provisions of this Act, less one-fifth (1/5) of one per cent (1%) as provided for in Section 6 hereof, shall be deposited in the State Treasury, in the proportion as follows: one-fourth (¼) of the same shall go to and be placed to the credit of the Available Free School Fund; the remaining three-fourths (¾) shall go to and be placed to the credit of the General Revenue Fund.

Invalidity as to Interstate Transmission; Effect

Sec. 11. In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption. *Acts 1951, 52nd Leg. p. 695, ch. 402,* § XXIII.

Emergency, Effective Sept. 1, 1951.

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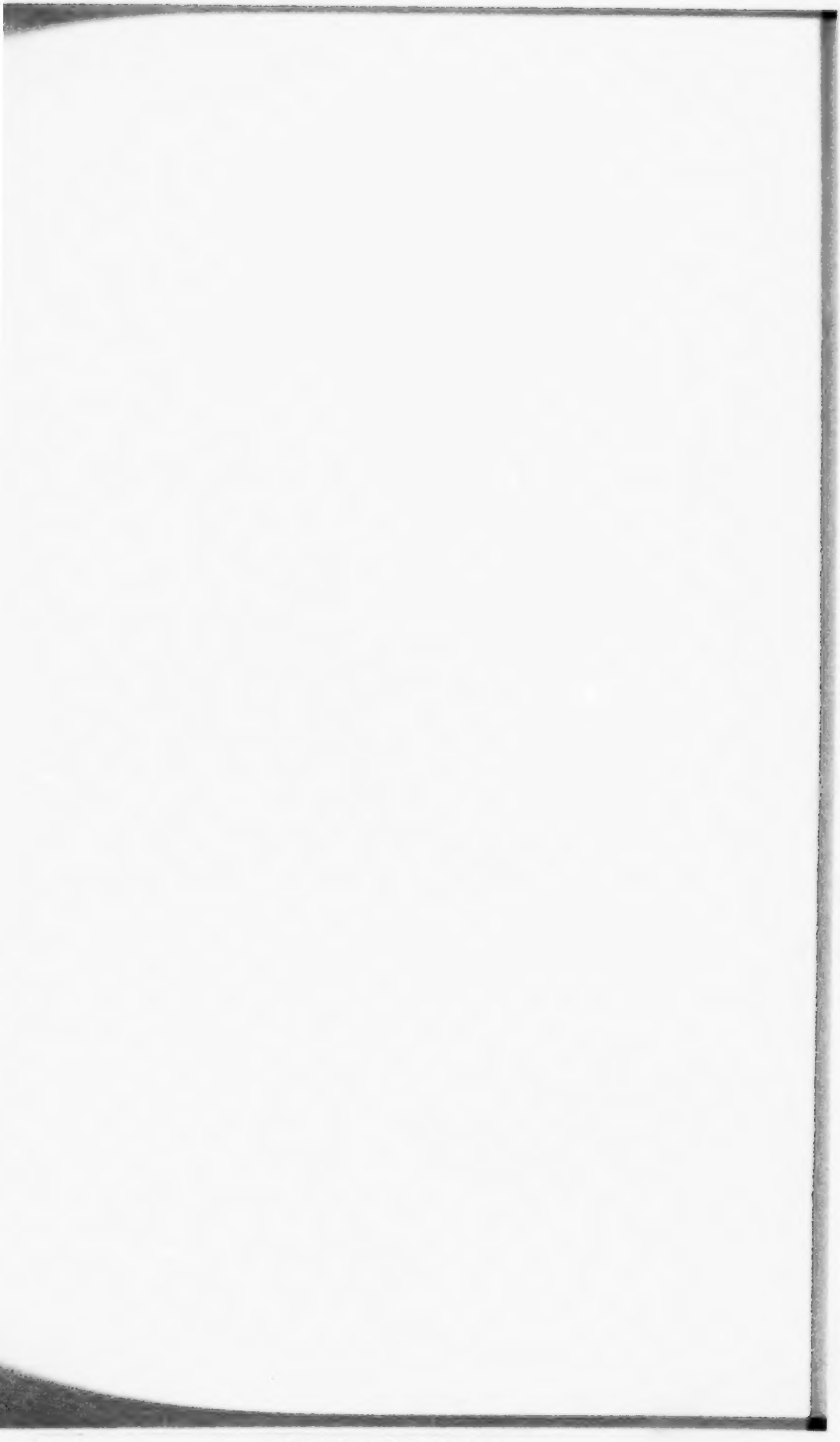

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